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14 UNITED STATES DISTRICT COURT
15 NORTHERN DISTRICT OF CALIFORNIA

17 COYNES L. ENNIX, JR., M.D.,

18 Plaintiff,

19 v.

20 ALTA BATES SUMMIT MEDICAL CENTER,

21 Defendant.

CASE NO. C 07-2486 WHA

**DEFENDANT'S MOTION IN LIMINE
NO. 6 TO EXCLUDE EVIDENCE
REGARDING EXISTENCE OF
WHITE MALE "CLUB"**

DATE: May 19, 2008
TIME: 2:00 p.m.
DEPT: Ctrm. 9, 19th Floor
JUDGE: Hon. William H. Alsup

COMPLAINT FILED: May 9, 2007
TRIAL DATE: June 2, 2008

I. INTRODUCTION

Defendant Alta Bates Summit Medical Center ("ABSMC" or "the Hospital"), hereby applies for an order *in limine*, directing that Plaintiff Coyness L. Ennix ("Plaintiff"), his counsel, and witnesses be precluded from offering testimony at the trial of this action referring to and describing the white physicians at ABSMC as a "club" of white male physicians. Such testimony is irrelevant and clearly meant to inflame the jury, impute racial motives to White physicians at the Hospital and to serve as a proxy for evidence that Plaintiff was subjected to discrimination. Such testimony is not relevant to any issue to be tried in this action, and is far more prejudicial than probative. The order *in limine* is requested pursuant to Federal Rules of Evidence 401 and 403.

II. FACTUAL AND PROCEDURAL BACKGROUND

Following an extensive peer review of Plaintiff's surgical practices and outcomes, the Summit Medical Staff Medical Executive Committee's ("MEC") restricted Plaintiff to surgical assisting between May and October 2005, and to proctoring between October and July of 2005. This action concerns Plaintiff's claims that the Hospital's decision to refer him for peer review, and MEC's resultant disciplinary actions constituted race discrimination and were in violation of 42 U.S.C. § 1981.

In connection with opposing the Hospital's Motion for Summary Judgment, Plaintiff made repeated references to White doctors at the Hospital as being members of a "club" of white male physicians. Specifically, Plaintiff asserts:

- "ABSMC has a history of manipulating the peer review system to eliminate competition from doctors who are not part of a close-knit 'club' of white, male physicians." (Opp. to MSJ 3:7-9.)
- Plaintiff's "peer review process...involved many of the same members of the 'club' that has tried to destroy Dr. Ennix's career.' (Opp. to MSJ, 3:23-4:1.)
- "The description of the power brokers at ABSMC as a 'club' of white, male physicians is not hyperbole. The majority of the key decision makers regarding Dr. Ennix's punishment are a close-knit group of

1 exclusively white, male friends." (Opp. to MSJ, fn. 5,
 2 6:22-23.)

3 **III. ARGUMENT**

4 ABSMC anticipates that Plaintiff, his witnesses and counsel will seek to
 5 introduce testimony referring to White physicians at the Hospital, including Drs. Stanton,
 6 Dr. Iverson, Dr. Moorstein and others as members of a "club" of White doctors who were
 7 intent on unfairly impairing Plaintiff's medical career. By hammering on White
 8 physicians' race and association with one another—in one case consisting of playing
 9 golf with one another twice over a period of 15 years—Plaintiff clearly intends to impute
 10 racial bias to those physicians.

11 As an initial matter such evidence is not relevant to any matter at issue in
 12 the trial of this action, and therefore is inadmissible under Federal Rule of Evidence 401.
 13 That rule provides that relevant evidence is "evidence having any tendency to make the
 14 existence of any fact that is of consequence to the determination of the action more
 15 probable or less probable than it would be without the evidence." Reference by Plaintiff,
 16 his witnesses and counsel to a "club" of white male physicians at ABSMC, and the fact
 17 that these physicians had known each other for some period of time is irrelevant to the
 18 issue of whether Plaintiff was subjected to discipline based on discrimination. Indeed,
 19 Plaintiff's evidence of the existence of the so-called club is scanty at best. For example,
 20 referring to Drs. R. Stanton, S. Stanton, Iverson, Moorstein and Paxton, Plaintiff states:
 21 "All of these doctors are white men. All of them golf together." This hardly establishes
 22 the existence of a "club." (Opp. to MSJ, fn 5 6:27-28.) The cited testimony in support of
 23 Plaintiff's belief that there was a "club" of White men determined to eliminate his practice
 24 includes testimony of Dr. Iverson that he "took [Dr. Russell Stanton] out to play golf two,
 25 maybe three times over the years we were together" as business associates, and that he
 26 never played golf with Dr. Steven Stanton. See, Iverson Deposition 43:2-11, Ex. K to
 27 Sweet Decl. in Opp. to MSJ. Other cited "evidence" of the existence of an alleged "club"
 28 of White males provides no support for such a claim. Plaintiff states that Russell and

1 Steven Stanton are brothers, that Dr. Iverson was acquainted with the Stantens' father,
 2 and knew Dr. Russell Stanton since he was a teenager. (Opp. to MSJ, fn 5, 6:23-25.)

3 The anticipated testimony regarding a "club" of White physicians is
 4 calculated to impute racial bias to the doctors participating in the peer review based
 5 solely on negative stereotypes and in the absence of any actual, relevant direct or
 6 indirect evidence of discrimination. Plaintiff's attribution of bad motive to White
 7 physicians and by extension to the Hospital consists merely of their association—in
 8 some cases tenuous—association with one another. This is not relevant to any showing
 9 that the actions of White physicians involved in the peer review process acted with racial
 10 animus or that African American doctors were subject to disparate treatment. Reference
 11 to White male physicians at the Hospital as members of a club, or any similar reference,
 12 is therefore inadmissible.

13 Such testimony is also properly excluded as inadmissible pursuant to
 14 Federal Rule of Evidence 403, which provides:

15 Although relevant, evidence may be excluded if its
 16 probative value is substantially outweighed by the
 17 danger of unfair prejudice, confusion of the issues, or
 18 misleading the jury, or by considerations of undue
 19 delay, waste of time, or needless presentation of
 20 cumulative evidence

21 Testimony that White physicians at the Hospital constituted a "club" of
 22 White males is not probative of any issue in this case and can only serve to
 23 unfairly prejudice the jury against the Hospital. Clearly by conjuring up the image of a
 24 "club" of White male physicians, Plaintiff intends to create prejudice and prejudgment of
 25 the motives and actions of the Hospital and those participating the peer review. Such
 26 evidence has no place at the trial of this action.

27 In *Jinro America, Inc. v. Secure Investments, Inc.* (9th Cir. 2001) 266 F.3d
 28 993, 1001, the court of appeal found that the district court improperly admitted testimony
 of an expert which imputed to Korean companies an "alleged propensity to engage in
 fraudulent activity." The case involved the trial of a civil action between companies in

1 which allegations of breach of contract, fraud and racketeering were made. *Id.* at 995-
 2 996. The witness in question testified on behalf of the defendants as an expert on
 3 "Korean law and the business practice of Korean companies—particularly their alleged
 4 propensity to engage in fraudulent activity." *Id.* at 1001. The court rejected the
 5 testimony as to these racial stereotypes in part because it was "far more prejudicial than
 6 probative and should have been excluded under Rule 403." *Id.* at 1004. The court of
 7 appeal noted:

8 A number of cases have dealt with the problem of
 9 testimony that either directly or indirectly seeks to link
 10 a defendant's conduct to that which is said to be
 11 typical of a particular racial, ethnic group or nationality.
 12 Although most such cases involve criminal
 13 prosecutions, which implicate constitutional and other
 14 considerations that are not wholly applicable in civil
 15 litigation, their principles are nonetheless relevant
 here. Thus, as we recently stated in *Bird v. Glacier
 Elec. Coop., Inc.*, 253 F.3d 1136, 1151 (9th Cir. 2001):
 "[F]airness to parties and the need for a fair trial are
 important not only in criminal but also in civil
 proceedings, both of which require due process.
 Racial stereotyping cannot be condoned in civil
 cases."

16 *Jinro* at 1006-1007.

17 Although the *Jinro* case arose in the context of expert testimony, the
 18 principle at issue is properly applied to the instant case. Plaintiff should not be permitted
 19 to present irrelevant testimony that other doctors---based on their race and acquaintance
 20 with one another---were somehow pre-disposed to harbor racial bias toward Plaintiff.
 21 Nor does testimony that the White physicians at the Hospital belonged to a "club" of
 22 white males constitute evidence that Plaintiff was subjected to race discrimination or that
 23 African American physicians were disparately treated relative to their White colleagues
 24 at the Hospital. Such inflammatory testimony should be excluded at the trial of this
 25 action, as its only purpose is to inflame the jury and to exploit racial stereotypes and
 26 impute to Defendant racial motives that are unsupported by evidence.

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1 IV. **CONCLUSION**

2 For each of the foregoing reasons, Defendant Alta Bates Summit Medical
3 Center respectfully requests an order in limine preventing Plaintiff from introducing
4 testimony or evidence referring to a White male "club" of physicians at the Hospital
5 during the trial of this action.

6 DATED: April 29, 2008

Respectfully submitted,

7 KAUFF MCCLAIN & MCGUIRE LLP

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9 By: 
ALEX HERNAEZ

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11 Attorneys for Defendant
12 ALTA BATES SUMMIT MEDICAL
13 CENTER

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

COYNES L. ENNIX JR., M.D.,

Case No. C 07-2486 WHA

Plaintiff,

vs.

ALTA BATES SUMMIT MEDICAL
CENTER,

Defendants.

PLAINTIFF'S OPPOSITION TO
DEFENDANT'S MOTION IN
LIMINE NO. 6 RE WHITE MALE
"CLUB"

Trial Date: June 2, 2008

Dept: Ctrm. 9, 19th Floor

Judge: Hon. William H. Alsup

Dr. Ennix's case alleges institutional racism at ABSMC involving not a written policy, but the attitudes, prejudices, or shared purpose of key decision-makers. If the decision-makers involved did not know each other, or had only limited, purely professional relationships, proving a common attitude, prejudice or purpose of these decision-makers would be difficult. But that is not the case here. In this case, most of these key decision-makers—namely Drs. Steven Stanten, Russell Stanten, Iverson, Paxton and Moorstein—have relatively close, long-standing personal and professional relationships. The evidence that these key players have something more than strictly professional relationships makes the fact of a shared discriminatory attitude, purpose or

1 scheme "more probable . . . than it would be without the evidence." FRE 401. Therefore, this
 2 evidence is relevant.

3 The cast of characters and the positions of importance held by them is as follows:

4	Dr. Russell Stanton	Chief of the Cardiothoracic Surgery Peer Review Committee, member of the Surgery Peer Review Committee and a cardiac surgeon
5	Dr. Steven Stanton	Chief of the Surgery Peer Review Committee
6	Dr. Leigh Iverson	Former Chief of the Cardiothoracic Surgery Peer Review Committee, member of the Surgery Peer Review Committee and a cardiac surgeon
7	Dr. Bruce Moorstein	Former Chief of the Surgery Peer Review Committee
8	Dr. Lamont Paxton	Member of the Surgery Peer Review Committee and Chair of the Ad Hoc Committee that reviewed Dr. Ennix
9		

10 The relationships among these individuals who helped decide Dr. Ennix's fate include:

11 Drs. Russell and Steven Stanton are brothers. (R. Stanton: 16:19-24)¹ Russell Stanton and Dr.
 12 Iverson were business partners for over 10 years until Dr. Iverson retired. (R. Stanton: 5:9-14)
 13 Dr. Iverson was acquainted with the Stanton's father, and has known Russell Stanton since he
 14 was a teenager. (Iverson Depo: 41:24-41:25) Drs. Iverson and Moorstein are close friends.
 15 (Iverson: 154:13-24) Dr. Moorstein played the lead role along with Dr. Steven Stanton in
 16 ABSMC's use of outside reviewers to eliminate another minority surgeon – the only other
 17 surgeon subjected to outside review. ("Physician H" Decl., ¶¶ 10-14.) Dr. Paxton is a close
 18 friend of Dr. Steven Stanton. (Paxton 44:6-45:3; S. Stanton: 244:1-11) All of these doctors are
 19 white men. All of them golf together. (Iverson: 43:2-11; 154:3-12; S. Stanton: 244:1-11;
 20 247:15-20.)

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 27 ¹ All deposition transcript excerpts are attached to the Sweet Declaration in Opposition to
 28 Summary Judgment.

1 ABSMC seeks to prevent Dr. Ennix from referring to this group of doctors as a "white,
2 male 'club.'" But the relationships between these key decision-makers are relevant to Dr.
3 Ennix's claim, and counsel is entitled to use some "short hand" means of referring to those
4 relationships. Further, the term "club" is not pejorative; applicable pejorative terms would be
5 "cabal," "gang," or "sect," for example. And "white" and "male" are merely accurate
6 descriptions of the members.

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9 Dated: May 9, 2008

Respectfully submitted,

MOSCONE, EMBLIDGE & QUADRA, LLP

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11 By: _____
12 Rachel J. Sater

13 Attorneys for Plaintiff
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